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No. 14-916

IN THE
Supreme Court of the United States

KINGDOMWARE TECHNOLOGIES, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Federal Circuit

BRIEF OF MEMBERS OF CONGRESS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF THE ARGUMENT 3

ARGUMENT 5

I. The Federal Circuit's Interpretation of the 2006 Veterans Act Undermines Congress's Clear Goal of Maximizing Business Opportunities for Veterans and Returns the VA to the Prior Discretionary Statutory Regime Congress Explicitly Rejected 5

A. The History of Congress's Legislation in This Area Demonstrates That Congress Intended the Veterans Rule of Two to Be Mandatory for All VA Contracts. 6

B. Congress Enacted the 2006 Veterans Act in Recognition of the Unique Challenges Faced by VOSBs and SDVOSBs 12

C. A Mandatory Veterans Rule of Two Analysis Does Not Strip the VA of All Discretion, Nor Does It Impose a Substantial Burden. 14

II. The Federal Circuit's Opinion Creates an Untenable Situation As It Is Impossible for Either the VA or Those with Whom the VA Contracts to Know When VOSB and SDVOSB Goals Are Met. 17

A. It Is Impossible for the VA or Those with Whom It Contracts to Determine When the Statutory Goals of § 8127(a) Are Met in a Given Fiscal Year. 18

B. Congress Knows How to Draft Legislation Where Mandatory Procurement Requirements Expire When an Agency Meets Certain Goals—and the Veterans Act Does Not Contain Any of the Hallmarks of Such Legislation. 21

CONCLUSION 23

ADDENDUM

TABLE OF AUTHORITIES

CASES

Eldred v. Ashcroft, 537 U.S. 186 (2003) 14

Fishgold v. Sullivan Drydock & Repair Corp., 328 U.S. 275 (1946) 12

LBM, Inc., B-290682, Sept. 18, 2002, 2002 CPD ¶ 157 16

Res-Care, Inc. v. United States, 735 F.3d 1384 (Fed. Cir. 2013) 15

Sinclair Refining Co. v. Atkinson, 370 U.S. 195 (1962) 14

STATUTES

15 U.S.C. § 637(d) 6

15 U.S.C. § 644(g)(1)(A)(i) 18

15 U.S.C. § 644(g)(1)(A)(ii) 18

15 U.S.C. § 657f(b) 8, 10

38 U.S.C. § 8127(a) 9

38 U.S.C. § 8127(d) 4, 10, 15

Small Business Competitiveness Demonstration Program Act of 1988, Pub. L. No. 100-656, 102 Stat. 3853 ..... 21, 22

Veterans Benefit Act of 2003, Pub. L. No. 108-183, 117 Stat. 2651 8

Veterans Entrepreneurship and Small Business Development Act of 1999, Pub. L. No. 106-50, 113 Stat. 233 ..... 7, 8

LEGISLATIVE MATERIALS

152 Cong. Rec. 23,515 (2006) 15

A Proposed Amendment to H.R. 3082: Hearing Before the Subcomm. on Economic Opportunity of the H. Comm. on Veterans' Affairs, 109th Cong. (2006) 7

H.R. 3082, The Veteran-Owned Small Business Promotion Act of 2005 [et al.]: Hearing Before the Subcomm. on Economic Opportunity of the H. Comm. on Veterans' Affairs, 109th Cong. (2005) 5, 11

H.R. Rep. No. 106-206, pt. 1 (1999) 7

H.R. Rep. No. 109-592 (2006) 7, 8, 9, 10, 11, 13, 15

The State of Veterans' Employment: Hearing Before the H. Comm. on Veterans Affairs, 108th Cong. (2003) 8

OTHER AUTHORITIES

48 C.F.R. § 4.604(b)(2) 19

48 C.F.R. § 4.604(c) 19

48 C.F.R. § 19.202-5(b) 19

48 C.F.R. § 19.502-2 16

48 C.F.R. § 813.106 17

48 C.F.R. § 819.7007 17

48 C.F.R. § 819.7008 17

Bureau of Labor Statistics, *Employment Status of Persons 18 Years and Over by Veteran Status, Age, and Sex*, http://www.bls.gov/cps/aa2011/cpsaat48.pdf 13

Federal Procurement Data System, https://www.fpds.gov 19

Press Release, SBA, *SBA Announces Results of 2014 Small Business Federal Procurement Scorecard*, U.S. Small Bus. Admin. (June 24, 2015), http://tinyurl.com/pm7wszt 19

The Annual Agency Battle to Spend the Rest of Their Annual Budget, Wash. Post, Sept. 28, 2013, http://tinyurl.com/lsgzpdv 19

U.S. Dep't of Veterans Affairs, *Mission, Vision, Core Values & Goals*, http://www.va.gov/about_va/mission.asp (last visited Aug. 24, 2015) 9

INTEREST OF *AMICI CURIAE*[1]

Amici are all Members of the United States House of Representatives and United States Senate, some of whom were members of the 109th Congress, which passed the 2006 Veterans Act—the statute at issue in this case—and all of whom share an interest in ensuring that this Court is aware of Congress's steadfast commitment to supporting the nation's veterans and small businesses.[2] *Amici* are members of congressional committees dedicated to setting national policies that assist and promote small businesses, veterans, and the armed forces.

Amici include Senator John Boozman, who was instrumental in obtaining passage of the 2006 Veterans Act. In 2006, then-Representative Boozman was a member of the House Committee on Veterans' Affairs and Chairman of the Subcommittee on Economic Opportunity, which spearheaded the effort to ensure that veteran-owned small businesses would be first in line to compete for government contracts.

Then-Representative Boozman was the sponsor of the 2006 Veterans Act. He is joined on this brief by one of the Veterans Act's co-sponsors, Representative

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[1] No counsel for any party has authored this brief in whole or in part, and no entity or person, aside from *amici curiae* and their counsel, made any monetary contribution intended to fund the preparation or submission of this brief. Both Petitioner and Respondent have consented to the filing of this brief, and their written consents are on file with the Clerk of the Court.

[2] A complete list of *amici* Members of Congress is attached hereto in the Addendum.

Susan Davis, who now serves on the House Armed Services Committee.

Senator Boozman is currently a member of the Senate Committee on Veterans' Affairs, as are *amici* Senator Jon Tester and Senator Jerry Moran. Like Senator Boozman, Senator Moran was also a member of the 2006 House Veterans Affairs Committee.

Amici also include Representative Jeff Miller, who is currently Chairman of the House Committee on Veterans' Affairs and was a member of that Committee in 2006; as well as Representative Corrine Brown, who was also a member of the Committee in 2006 and is currently the Ranking Member. Additional *amici* who are currently members of the House Committee on Veterans' Affairs include Vice Chairman Gus Bilirakis, Representative Mike Coffman (Chairman of the Subcommittee on Oversight and Investigations), Representative Ann M. Kuster (Ranking Member of the Subcommittee on Oversight and Investigations), Representative Mike Bost, Representative Ryan A. Costello, Representative Doug Lamborn, Representative Aumua Amata Coleman Radewagen, Representative Phil Roe, and Representative Jackie Walorski. *Amici* also include Representative Bill Johnson, a veteran and former member of the House Veterans' Affairs Committee. As the former Chairman of the Subcommittee on Oversight and Investigations, Representative Johnson held two hearings in 2011 on the Department of Veterans Affairs' implementation of the 2006 Veterans Act.

Amici from the House Committee on Small Business include Chairman Steve Chabot and Ranking

Member Nydia M. Velázquez. They also include: Representative Richard L. Hanna (Chairman of the Subcommittee on Contracting and the Workforce), Representative Mark Takai (Ranking Member of the Subcommittee on Contracting and the Workforce), Representative Judy Chu, Representative Chris Gibson, Representative Janice Hahn, Representative Cresent Hardy, Representative Steve Knight, Representative Brenda L. Lawrence, Representative Grace Meng, and Representative Seth Moulton.

Amici also include a number of our nation's veterans who went on to serve in Congress, such as Senator John McCain, Chairman of the Senate Armed Services Committee.

SUMMARY OF THE ARGUMENT

The United States Congress recognizes the tremendous debt of gratitude we owe our men and women in uniform and their families for all that they have done for our country. Congress likewise recognizes that the transition from military back to civilian life is not always easy, and that this country needs to do all it can to support the men and women who have already given so much to their country. Over the years, Congress has passed a series of acts to help veterans with this transition, including legislation designed to increase veteran-owned small businesses' ("VOSBs") and service-disabled veteran-owned small businesses' ("SDVOSBs") access to government contracts. Helping veterans in this particular way also comports with Congress's steadfast commitment to supporting our country's small businesses.

As the agency specifically charged with assisting veterans, the Department of Veterans Affairs ("VA") bears a special responsibility to VOSBs and SDVOSBs. Yet, Congress observed that the VA's track record of awarding contracts to VOSBs and SDVOSBs fell far short of what it should have been. Thus, in 2006 Congress passed the Veterans Act to increase the award of government contracts to VOSBs and SDVOSBs by the VA. Unlike its predecessor statutes, which gave government agencies a great deal of discretion when awarding contracts, the 2006 Veterans Act expressly *limited* the VA's discretion by requiring that the VA set aside contract awards for VOSBs or SDVOSBs whenever it determined that there were at least two responsible VOSBs and SDVOSBs capable of fulfilling the contract at fair market prices. *See* 38 U.S.C. § 8127(d). This "Veterans Rule of Two," which is modeled on the mandatory small business "Rule of Two" for all federal contracts, ensures that VOSBs and SDVOSBs will be at the front of the line for virtually *all* VA contracts for which they can compete. To protect the government from paying more than it should, the Veterans Rule of Two allows for competition to be extended beyond VOSBs or SDVOSBs where two qualifying offers cannot be found at a fair price.

The Federal Circuit's decision below completely misunderstands what Congress was attempting to accomplish when it passed the 2006 Veterans Act. By holding that the Act does not always require the VA to conduct a Veterans Rule of Two analysis, the Federal Circuit actually *increased* the VA's discretion when awarding contracts, when too much agency discretion

was the very problem that prompted Congress to pass the Act in the first place. The Federal Circuit's conclusion was based on significantly flawed reasoning that ignores the fundamental goals of the 2006 Veterans Act, 38 U.S.C. § 8127 *et seq.*, to maximize the opportunities for veterans in recognition of the unique hardships they face in the marketplace, and to address the failures of prior discretionary legislation.

For the reasons set forth below, this Court should reverse the Federal Circuit and hold—as Congress intended—that the VA must employ the Veterans Rule of Two in awarding contracts whenever the requirements of § 8127(d) are satisfied.

ARGUMENT

I. The Federal Circuit's Interpretation of the 2006 Veterans Act Undermines Congress's Clear Goal of Maximizing Business Opportunities for Veterans and Returns the VA to the Prior Discretionary Statutory Regime Congress Explicitly Rejected.

In enacting the 2006 Veterans Act, Congress wanted the VA to "set the example for the rest of the Federal Government" by maximizing the contracts awarded to VOSBs and SDVOSBs in recognition of veterans' considerable sacrifices to this country. *H.R. 3082, The Veteran-Owned Small Business Promotion Act of 2005 [et al.]: Hearing Before the Subcomm. on Economic Opportunity of the H. Comm. on Veterans' Affairs*, 109th Cong. 2 (2005) ("2005 Hearing") (statement of Chairman Boozman). The Federal Circuit essentially rewrote the statute that Congress

intended by holding that § 8127(d) only requires a Veterans Rule of Two analysis until certain goals are met. *See* Pet. App. 17a-21a. As discussed below, not only are the Federal Circuit's arguments wrong and inconsistent with the application of the small business Rule of Two across the government, but they directly undercut Congress's clear intention to do *more* to help veterans in the 2006 Veterans Act after finding that prior discretionary statutory regimes had failed to do enough.

A. The History of Congress's Legislation in This Area Demonstrates That Congress Intended the Veterans Rule of Two to Be Mandatory for All VA Contracts.

The essence of the Federal Circuit's holding below was that the VA should not have to use the so-called Veterans Rule of Two "*after* it has met the [VOSB and SDVOSB] goals set under § 8127(a)." Pet. App. 19a-20a (emphasis in original). The Federal Circuit apparently reasoned that the 2006 Veterans Act intended for the VA to precisely meet its pre-established VOSB and SDVOSB contracting goals (but never actually *exceed* them) and then abandon any interest in fostering veteran-owned businesses until the start of the next fiscal year.

The court's rationale is untenable in light of Congress's steadfast commitment to *maximizing* opportunities for veterans. "It is the policy of the United States that ... [VOSBs and SDVOSBs] ... shall have the *maximum practicable opportunity* to participate in the performance of contracts let by any Federal agency." 15 U.S.C. § 637(d) (emphasis added).

Accordingly, Congress designed § 8127(d) to ensure that VOSBs and SDVOSBs are "routinely ... granted the primary opportunity to enter into VA procurement contracts," H.R. Rep. No. 109-592 at 14-15 (2006), and that the VA would "put veteran businesses at the head of the line for small business set-asides," *A Proposed Amendment to H.R. 3082: Hearing Before the Subcomm. on Economic Opportunity of the H. Comm. on Veterans' Affairs*, 109th Cong. 1 (2006) (statement of Chairman Boozman). Congress did not merely want the VA to meet certain quotas and then move on—Congress wanted the VA to exceed its quotas and maximize the involvement of veterans in the American economy. *See* Pet. App. 30a (Reyna, J., dissenting) ("[P]articipation goals are aspirations, not destinations."). Indeed, Congress enacted the 2006 Veterans Act with the specific intent of doing more to increase contract awards to veterans from the very agency charged with the special responsibility for helping veterans. Congress was frustrated because past legislation had failed, and veterans continued to be drastically underrepresented in government contracting.

Among Congress's past attempts to help veterans was the Veterans Entrepreneurship and Small Business Development Act of 1999 ("1999 Act"), *see* Pub. L. No. 106-50, § 101(3), 113 Stat. 233, 234, which amended the Small Business Act. The 1999 Act was intended to "raise the awareness of federal procurement officials" as to the underrepresentation of service-disabled veterans in government awards. H.R. Rep. No. 106-206, pt. 1 at 14 (1999). The Act required each federal agency to set an annual goal of no less than

3% of total contract awards for SDVOSB contracts. *See* 1999 Act § 502, 133 Stat. at 247. However, the Act lacked teeth: agencies were not forced to set aside any contracts for service-disabled veteran-owned businesses and were not formally encouraged to do so. As a consequence, the Act was a failure and contract awards fell well short of even the paltry 3% goal. *See, e.g., The State of Veterans' Employment: Hearing Before the H. Comm. on Veterans Affairs*, 108th Cong. 21-22 (2003); Pet. App. 4a-5a (noting that VA awarded only 0.1% of its contracts to SDVOSBs in 2000, 0.2% in 2001, and 0.6% in 2002).

Congress tried again in 2003, amending the Small Business Act by passing the Veterans Benefit Act of 2003 ("2003 Act"). *See* Pub. L. No. 108-183, § 308, 117 Stat. 2651, 2662. The 2003 Act went a little further: it stated a preference for service-disabled veteran-owned businesses to receive government contract awards, *see id.*, but the decision to award such contracts was ultimately left to the discretion of the contracting officers. *See* 15 U.S.C. § 657f(b) (officer "may" award contracts to SDVOSBs under the Veterans Rule of Two). Again, the legislation failed to produce measurable returns. As of 2005, "virtually no Federal agency, including the VA, ha[d] achieved either the spirit or will of the law" in terms of SDVOSB contract awards. 2005 Hearing at 2. Indeed, "total federal agency contracting with [SDVOSB] amounted to only 0.605 percent in 2005," well below the goal of 3%. H.R. Rep. 109-592 at 16.

Following these failed efforts, there was widespread "frustrat[ion] with respect to the efforts of the majority

of federal agencies to enter into contracts with [SDVOSBs]," *id.* at 15-16, and Congress appropriately concluded that this state of affairs was unacceptable, especially for the VA, which is tasked with "serving and honoring the men and women who are America's Veterans." U.S. Dep't of Veterans Affairs, *Mission, Vision, Core Values & Goals*, http://www.va.gov/about_va/mission.asp (last visited Aug. 24, 2015). Congress believed that the failure of its prior acts stemmed from "a culture of indifference or ignorance by many procurement officials with respect to the [SDVOSB] provisions." H.R Rep. 109-592 at 15-16. Congress heard testimony stating that "the discretionary, not mandatory, nature of the goals" and "the lack of real contracting tools (such as set-asides or restricted contracts)" were significant reasons why the prior acts had failed. *Id.* at 15. In other words, legislative experimentation had proven that purely discretionary tools would fail to ensure that veterans could adequately compete for federal procurement contracts.

Accordingly, Congress passed the 2006 Veterans Act to remedy the problems of prior legislation and "improve on [the] VA's contracting efforts" with VOSBs and SDVOSBs. H.R Rep. 109-592 at 15; *id.* at 14 (noting that veterans, through their sacrifices, "ha[d] earned the opportunity to compete for VA contracts"). As part of its goal of maximizing the contract awards for veterans, the 2006 Veterans Act required the VA to establish annual benchmarks for VOSB and SDVOSB contract awards. *See* 38 U.S.C. § 8127(a). Given the failure of prior legislation to remedy the underrepresentation of veterans in contract awards,

Congress wanted the VA not just to meet, but to *exceed* its goals and maximize business awards for veterans. Indeed, this was explicitly confirmed by the House Committee on Veterans Affairs, which stated that "the provisions of [the 2006 Veterans Act] will provide the VA with the necessary procurement tools to meet, *if not exceed*, its contracting goals." H.R Rep. 109-592 at 15 (emphasis added).[3]

Congress thus made a distinct policy choice: a genuinely mandatory procurement requirement would ensure that discretion and indifference would no longer prevent VOSBs and SDVOSBs from participating fully in the economy. Accordingly, the "may" in the 2003 Act was changed to "shall" in the 2006 Veterans Act. *Compare* 15 U.S.C. § 657f(b) (a contracting officer "*may* award contracts on the basis of competition restricted to" SDVOSBs when Rule of Two is satisfied (emphasis added)), *with* 38 U.S.C. § 8127(d) ("a contracting officer of the [VA] *shall* award contracts on the basis of competition restricted to" VOSBs and SDVOSBs when the Veterans Rule of Two is satisfied (emphasis added)). Given the failure of prior discretionary policies, and the existing Rule of Two for small businesses, this word change was not merely an exercise in semantics.

The VA and the Federal Circuit have both cited to a single line in the legislative history that they claim shows that the change from "may" to "shall" was

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[3] The exceptions to the Veterans Rule of Two outlined in § 8127(b) and (c)—which are even *more* pro-veteran than § 8127(d)—also illustrate that Congress was set on maximizing the business opportunities available to veterans.

intended to refer to the VA's goals, not to the Veterans Rule of Two analysis. *See* Pet. App. 20a-21a (quoting Chairman Boozman as stating that § 8127 "changed what has been a 'may' to a 'shall' in terms of goals"); BIO 14 (same). However, that reference to "goals" has been taken out of context. Chairman Boozman—who joins this brief—was key in shepherding the 2006 Veterans Act through Congress, and he made pellucidly clear that the "VA should set the example for the rest of the Federal Government," 2005 Hearing at 2, by "routinely ... grant[ing VOSBs and SDVOSBs] the primary opportunity to enter into VA procurement contracts," H.R. Rep. No. 109-592, at 14-16. But the VA could not "set the example" when it still "lack[ed] real contracting tools (such as set-asides or restricted contracts)" and exercised considerable discretion in awarding contracts. *Id.* at 15. Thus, Chairman Boozman insisted that the Veterans Rule of Two language be changed from "may" to "shall," because "it is very difficult to get things done with agencies if we don't make them do it." 2005 Hearing at 29. The Federal Circuit and the VA were wrong to place such weight on one part of one line of legislative history mentioning goals, when the weight of the legislative history clearly shows that Congress realized a mandatory Veterans Rule of Two was the only way to boost the anemic rate of awards to VOSBs and SDVOSBs.

The Federal Circuit's decision below ignores Congress's considered judgment about what would work best to implement the goals of helping veterans in the government contracting marketplace and essentially changed the "shall" back into a "may." By

concluding that § 8127(d) is not always mandatory, the Federal Circuit returned the VA to a system where it exercises vast discretion in determining when it can favor VOSBs and SDVOSBs. That is precisely why the prior acts failed, and precisely why Congress made § 8127(d) mandatory. Thus, the Federal Circuit's decision effectively repeals the most-important aspect of the 2006 Veterans Act, undercutting Congress's exclusive prerogative to weigh policy considerations and favor business opportunities for veterans.

B. Congress Enacted the 2006 Veterans Act in Recognition of the Unique Challenges Faced by VOSBs and SDVOSBs.

Congress's interest in maximizing the involvement of veterans in the government contracting marketplace was based on a desire to address the special challenges that veterans have always faced in returning to civilian life. *See Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 284 (1946) ("He who was called to the colors was not to be penalized on his return by reason of his absence from his civilian job. He was, moreover, to gain by his service for his country an advantage which the law withheld from those who stayed behind.").

As Congress recognized, veterans often spend their prime years in defense of the nation, forgoing opportunities to obtain traditional civilian certifications and academic credentials. Congress also recognized that "often former servicemembers are not able to obtain licenses or certification for the civilian equivalents based on their military experience and training," which means veterans must incur additional

"expens[es]," "duplicative training[,] and lost time on-the-job" just to obtain the same credentials that non-veterans possess. H.R Rep. 109-592, at 20-21. Additionally, "many servicemembers who separate from the military and enter civilian life would prefer to seek employment in the civilian workforce that reflects generally the skills and experience they gained during their military service rather than seek a degree at a traditional post-secondary institution," *id.* at 21, which means that veterans often do not have the traditional academic credentials that competing non-veteran business owners will possess.

The effects of these difficulties are borne out in employment figures. At the height of unemployment in 2011, recent veterans (serving since 2001) had an overall unemployment rate of 12.1%, compared to 8.7% for non-veterans. Bureau of Labor Statistics, *Employment Status of Persons 18 Years and Over by Veteran Status, Age, and Sex*, http://www.bls.gov/cps/aa2011/cpsaat48.pdf. It was even worse for certain demographics, such as young female veterans (ages 18-24), who had an unemployment rate of 36.1%, compared to 14.5% for non-veteran females of the same age. *Id.*

Recognizing the difficulties faced by veterans and confronting the fact that prior legislation was simply not working, Congress made a policy choice: the VA would set ambitious goals for VOSB and SDVOSB awards, and the mandatory Veterans Rule of Two would ensure that the VA not only met, but *exceeded* those goals. Thus, contrary to the Federal Circuit's conclusion, there were significant policy rationales

behind § 8127(d)'s mandate that the VA apply a Rule of Two analysis for VOSBs and SDVOSBs, even after the VA meets its annual goals. Congress's strong interest in maximizing veterans' business opportunities and in supporting small businesses is unwavering; it does not disappear and reappear depending on whether the VA has met self-imposed annual goals.

C. A Mandatory Veterans Rule of Two Analysis Does Not Strip the VA of All Discretion, Nor Does It Impose a Substantial Burden.

In reaching its erroneous conclusion below, the Federal Circuit also reasoned that interpreting § 8127(d) to apply to all contracts would be bad policy because it could render superfluous the VA's discretion in setting its annual goals and impose a substantial burden on the VA. *See* Pet. App. 17a-18a. These rationales are misguided.

As a threshold matter, it was not the Federal Circuit's place to pass judgment on the policy decisions of Congress. As this Court has noted, the "wisdom of Congress' action ... is not within [the judiciary's] province to second-guess." *Eldred v. Ashcroft*, 537 U.S. 186, 222 (2003). "The question of what change, if any, should be made in the existing law is one of legislative policy properly within the exclusive domain of Congress—it is a question for law makers, not law interpreters." *Sinclair Refining Co. v. Atkinson*, 370 U.S. 195, 214-15 (1962). By picking and choosing its preferred interpretation of the 2006 Veterans Act, the Federal Circuit improperly trespassed onto Congress's "exclusive domain" to weigh policy considerations and make law.

The Federal Circuit's reasoning also completely overlooked Congress's desire to *limit and focus* the VA's discretion, not remove it entirely. It is true that veterans' total share of VA procurement contracts will be heavily influenced by the application of the Veterans Rule of Two to all contracts, but that was Congress's intent. After years of failing to satisfy even paltry goals using a discretionary award system, Congress realized that something had to change, and that is precisely why it made the Veterans Rule of Two mandatory for the VA. *See* H.R Rep. 109-592 at 15-16.

However, it was erroneous for the Federal Circuit to conclude that the VA no longer has any discretion at all when awarding contracts. While the VA always must conduct a Veterans Rule of Two *analysis*, the VA still retains discretion to decide whether there is a reasonable expectation that the Veterans Rule of Two will *actually be satisfied* for any given contract. Under § 8127(d), a set-aside for VOSBs or SDVOSBs must occur only when the VA procurement officers have a reasonable expectation that (a) offers will be made by at least two responsible VOSBs or SDVOSBs and (b) an award can be made at fair market prices. *See* § 8127(d); Pet. App. 30a (Reyna, J., dissenting). Congress recognized that, as part of the process, "acquisition officials will exercise reasonable judgment," 152 Cong. Rec. 23,515 (2006), and the VA's decision will be subject only to "highly deferential rational basis review," *ResCare, Inc. v. United States*, 735 F.3d 1384, 1390 (Fed. Cir. 2013) (quotation marks omitted). Accordingly, veterans' total share of VA procurement contracts still will be determined largely by the VA's business judgment as to whether there are potentially at least

two viable VOSB or SDVOSB offerors for any particular contract.

Also misplaced is the Federal Circuit's suggestion that making the Veterans Rule of Two mandatory for all contracts would be overly burdensome for the VA. *See* Pet. App. 18a. This is erroneous for several reasons. *First*, as discussed above, the VA is not required to follow the set-aside procedure in § 8127(d) unless the VA first determines that the conditions for the Veterans Rule of Two are actually satisfied.

Second, Congress knew that all government contracts over $3,000 already go through a mandatory Rule of Two analysis for small businesses, subject to certain exceptions. *See* 48 C.F.R. § 19.502-2. Section 8127(d) simply requires that the VA conduct the very same analysis for VOSBs and SDVOSBs that every government agency—including the VA itself—already conducts for small businesses in general.[4] This renders implausible the Federal Circuit's and the VA's suggestion that a mandatory Rule of Two analysis would impose a substantial burden. *See* Pet. App. 29a (Reyna, J., dissenting) ("The majority does not address the practical implications of its decision in light of the VA's *existing* obligations under the Federal

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[4] Mandating that the Veterans Rule of Two continue to be applied even after the VOSB and SDVOSB goals have been satisfied is also consistent with the Federal Acquisition Regulation's ("FAR's") policy towards small businesses in general. The FAR requires that agencies conduct a Rule of Two analysis regardless of whether the agency's "small business goals have already been satisfied." *LBM, Inc.*, B-290682, Sept. 18, 2002, 2002 CPD ¶ 157, at 9.

Acquisition Regulation ('FAR') to conduct a Rule of Two analysis in nearly every acquisition exceeding $3,000." (emphasis in original)).

Third, the VA's regulations implementing the 2006 Veterans Act state that the VA can still make small scale purchases using the authority of § 8127(b) and (c). *See* 48 C.F.R. §§ 813.106, 819.7007-.7008. This is directly contrary to the VA's argument that it would have to conduct a Rule of Two analysis every time it wants to buy a "griddle or food slicer." BIO 12.

Although the Federal Circuit may think otherwise, Congress concluded that it was good policy for the VA to set aside contracts for VOSBs and SDVOSBs whenever the conditions of § 8127(d) are satisfied. *Amici*, a broad and diverse group of Members of Congress, have come together to ensure that Congress's considered judgment cannot be trumped by the Federal Circuit's misplaced concerns about whether a mandatory Rule of Two is good policy for the VA.

II. The Federal Circuit's Opinion Creates an Untenable Situation As It Is Impossible for Either the VA or Those with Whom the VA Contracts to Know When VOSB and SDVOSB Goals Are Met.

The Federal Circuit's interpretation of § 8127(d) is flawed for the additional reason that it is based on the erroneous belief that VA can measure the progress on its VOSB and SDVOSB goals in real-time so that each and every contracting officer in the VA knows when to start and stop applying the Veterans Rule of Two. As

Congress well knew, this is impossible under the current budgetary process and reporting requirements.

Congress knows how to pass legislation where a mandatory regulation for procurement awards would be turned on and off based on an agency's success or failure—yet the 2006 Veterans Act contains no such language. The mandate in § 8127(d) is just that: mandatory, for *all* contracts.

A. It Is Impossible for the VA or Those with Whom It Contracts to Determine When the Statutory Goals of § 8127(a) Are Met in a Given Fiscal Year.

The Federal Circuit held that the Veterans Rule of Two applies only until the VA satisfies its VOSB and SDVOSB contracting goals set pursuant to § 8127(a). Pet. App. 19a-20a. After that, the Federal Circuit held, the requirement no longer applies, and the VA can return to the prior discretionary award system.

However, that interpretation makes sense only if it is possible for the VA to gauge in real-time where it stands *vis á vis* its annual VOSB and SDVOSB goals. Because VOSB and SDVOSB goals are set as percentages of the total dollar value of the VA's procurement awards, the VA would have to be able to determine in advance: (a) the total amount it will spend on procurement for the year, and (b) the year-end distribution of its spending on procurement (*i.e.*, who the contracts are going to). *See* 15 U.S.C. § 644(g)(1)(A)(i), (ii).

Congress was well aware that this would be an impossible task for the VA, which does not keep track

of its actual procurement spending or the distribution of that spending in real-time. Although the VA must report most contracts to the Federal Procurement Data System ("FPDS") within three business days of the contract award, *see* 48 C.F.R. § 4.604(b)(2), the FPDS data does not have to be certified as complete and accurate until 120 days *after* the fiscal year ends, *id.* § 4.604(c). Additionally, while the VA must measure the extent of participation by small businesses for each fiscal year, the VA does not have to report that data to the Small Business Administration ("SBA") until the *end of the fiscal year*, *see id.* § 19.202-5(b), and, in fact, these reports often take *half* of the following fiscal year to compile, *see* Press Release, SBA, *SBA Announces Results of 2014 Small Business Federal Procurement Scorecard*, U.S. Small Bus. Admin. (June 24, 2015), http://tinyurl.com/pm7wszt (announcing, six months behind schedule, the small business results for fiscal year 2014).

Further, the VA's spending is not smooth throughout the fiscal year: it is well known that government agencies have long employed a use-it-or-lose-it mentality when it comes to their budgets, rushing to spend all of their appropriations just before the fiscal year ends. *See The Annual Agency Battle to Spend the Rest of Their Annual Budget*, Wash. Post, Sept. 28, 2013, http://tinyurl.com/lsgzpdv. The VA is no exception: according to information from the public FPDS database, in fiscal year 2014, the VA obligated 40% of its annual VOSB and SDVOSB spending during the fourth quarter, with 14.1% coming during the final *week* alone. *See* Federal Procurement Data System, https://www.fpds.gov.

This practice has two relevant consequences for the Federal Circuit's interpretation of § 8127: (1) the VA's uneven spending patterns make it that much harder for anyone to *predict* when the VA might satisfy its annual VOSB and SDVOSB goals; and (2) the frenzy of spending at year's end makes it even more difficult to determine in *real-time* the precise point when the goals might be satisfied—and by the time the VA could make such a determination, the fiscal year would have already ended and another begun. Given this lack of real-time data, there is no point during the fiscal year when the VA can declare that its § 8127(a) goals are met for that year. Yet, the Federal Circuit's interpretation of § 8127(d) implies that Congress intended for the VA to do just that.[5]

Further, because the VA cannot know when the Secretary's VOSB and SDVOSB goals will be met in a given fiscal year, there is certainly no way for those with whom the VA might contract to know. The Federal Circuit's interpretation would create confusion by making it difficult for non-veteran-owned small businesses to predict in advance when the Veterans Rule of Two will be applied. A system that changes the rules of competition at some indeterminable time (and possibly in the middle of a competition) would make it impossible for any small business to know when it should expend bid and proposal dollars in pursuing a possible award, or when it would be unlikely to receive

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[5] It is also unlikely that Congress would have relied on the VA's self-reporting. In fact, there has been considerable debate over the accuracy of the VA's accounting methods for small-business awards. *See* Pet. 21 n.4.

an award because it would face full and open competition for VA contracts. There is no reason why Congress would have sought to present VOSBs with such uncertainty while ostensibly attempting to assist those very businesses.

B. Congress Knows How to Draft Legislation Where Mandatory Procurement Requirements Expire When an Agency Meets Certain Goals—and the Veterans Act Does Not Contain Any of the Hallmarks of Such Legislation.

Even putting aside the Federal Circuit's erroneous assumption that the VA can measure its success in *real-time*, there is also a complete lack of legislative indicia suggesting that Congress intended the Veterans Rule of Two to turn on and off based on any sort of *post hoc* analysis of whether the VA met its benchmarks. Congress knows how to draft legislation where mandatory procurement requirements are relaxed or removed upon an agency's showing that it is has met certain awards benchmarks. An example is the Small Business Competitiveness Demonstration Program Act of 1988 ("SBCDP"), Pub. L. No. 100-656, 102 Stat. 3853, which was on the books from 1988 until 2010.

The SBCDP was enacted in 1988 to "eliminate obstacles to competition and thereby to broaden small business participation." *Id.* § 702(2), 102 Stat. at 3889. Under the SBCDP, participating agencies were required to set a goal of awarding 40% of the dollar value for each designated industry group to small businesses. *Id.* § 712(a), 102 Stat. at 3890. Agencies also were required to make a good faith effort to award

no less than 15% of the dollar value of these contracts to small businesses. *Id.*

To be sure that agencies met these goals, Congress required agencies to monitor their small business participation goals "on a quarterly basis." *Id.* § 712(d)(1), 102 Stat. at 3891. Agency reviews were based on "the aggregate of contract award data from the 4 quarters preceding the date of the review for which data is available." *Id.* Agencies that failed to attain their small business participation goals were *required* to award future contracts on the basis of a competition that was restricted only to eligible small businesses. *Id.* § 713(b), 102 Stat. at 3892. Congress then permitted agencies to reinstate full and open competition "*upon determining that [the agency's] contract awards to small business concerns meet the required goals.*" *Id.* (emphasis added).

The SBCDP is an example of Congress making clear its intent to monitor agencies' quarterly results, and, based on that *post hoc* analysis, impose or relax mandatory procurement procedures depending on a particular agency's success. The 2006 Veterans Act, by contrast, contains none of these elements. There is no quarterly or other special reporting, no penalties for failure to comply, and no relaxation of mandatory policies upon a showing of compliance. Congress certainly knew about the SBCDP and easily could have modeled the 2006 Veterans Act after it. But Congress chose not to do so, and, as *amici* recognize from their combined decades of experience, such a legislative choice is normally purposeful.

The Federal Circuit's interpretation of § 8127(d) is erroneous because there is no way the VA could measure its results in real-time, nor is there any evidence suggesting that Congress intended for the Rule of Two's set-aside mandate to turn on and off depending upon the VA's success or failure. The simpler explanation is the correct one: the Veterans Rule of Two analysis is mandatory for all contracts.

CONCLUSION

For the foregoing reasons, *amici* urge the Court to reverse the judgment of the United States Court of Appeals for the Federal Circuit.

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